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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 DANIEL BENJAMIN BACH,

9 Petitioner,

10 v.

11 JEFFREY A. UTTECHT et al.,

12 Respondents.

CASE NO. C19-5481 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION

13 This matter comes before the Court on the Report and Recommendation (“R&R”)
14 of the Honorable Theresa L. Fricke, United States Magistrate Judge, Dkt. 15, and
15 Petitioner’s objections to the R&R, Dkt. 16.

16 On May 23, 2019, Petitioner filed a proposed petition for writ of habeas corpus
17 pursuant to 28 U.S.C. § 2254. Dkt. 1.¹ Petitioner challenges his incarceration under a
18 Pierce County Superior Court judgement convicting him of two counts of rape of a child
19 in the first degree. Dkt. 7 (petition for writ of habeas corpus). Petitioner raises four
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21 ¹ Petitioner initially brought this action in the Eastern District of Washington, but the file was
22 transferred to this District. *See* Dkt. 3; *see also* 28 U.S.C. § 2241(d) (petition for federal habeas relief
must be brought in the district where the conviction arose).

1 grounds for relief in his petition, all of which are premised on the allegation that his
2 conviction violated his rights under the Fifth Amendment because he was charged by
3 information, rather than by an indictment issued by a grand jury. *Id.*

4 On June 20, 2019, Judge Fricke issued an order requiring Petitioner to show cause
5 by July 19, 2019 why his petition should not be dismissed for failure to exhaust state
6 judicial remedies. Dkt. 9 (citing Rule 4 of the Rules Governing Section 2254 Petitions).
7 Petitioner admits he has brought no appeals or collateral attack in state court. Dkt. 7 at 3,
8 4; *see also* Dkt. 9 at 1 n.1.

9 On June 21, 2019, Petitioner responded to the show cause order by filing a motion
10 to show cause, Dkt. 12, and a motion for petitioner initiated summary judgment, Dkt. 13.
11 On December 29, 2019, Petitioner filed a motion to amend case caption. Dkt. 14. On
12 February 3, 2020, Judge Fricke issued the R&R recommending dismissal of the petition
13 for failure to exhaust state judicial remedies. Dkt. 15.

14 On February 9, 2020, Petitioner filed objections to the R&R. Dkt. 16.

15 The district judge must determine de novo any part of the magistrate judge's
16 disposition that has been properly objected to. The district judge may accept, reject, or
17 modify the recommended disposition; receive further evidence; or return the matter to the
18 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

19 First, Petitioner contests the well-settled and binding rule requiring him to exhaust
20 his state court remedies before seeking relief in federal court. Dkt. 16 at 1–4; *see also*
21 *Picard v. Connor*, 404 U.S. 270, 275 (1971) (“a state prisoner must normally exhaust
22 available state judicial remedies before a federal court will entertain his petition for

1 habeas corpus.”); 28 U.S.C. § 2254(b)(1) (a district court “shall not” grant an application
2 for a writ of habeas corpus unless the prisoner has first “exhausted the remedies
3 available” in state court.).

4 Petitioner contends that the federal court has original jurisdiction over his petition
5 pursuant to 28 U.S.C. § 1343,² which requires the court to hear the petition before its
6 claims are considered and thereby exhausted in state court. Dkt. 16 at 1–4. Petitioner,
7 however, readily acknowledges that he filed a “Writ of Habeas Corpus pursuant to 28
8 U.S.C. § 2254.” Dkt. 16 at 1; *see also* Dkt. 7. Consequently, Petitioner fails to persuade
9 the Court that the state exhaustion requirement does not apply in his case.

10 The Court may consider an unexhausted federal habeas petition if there is an
11 absence of state corrective process or where state corrective process would be rendered
12 ineffective. 28 U.S.C. § 2254(b)(1)(B). Petitioner, however, fails to meet this standard.
13 Instead, he simply restates his assertion that Washington State has abridged his rights
14 under the Fifth Amendment and concludes that this alleged violation would make
15 exhaustion in state courts futile. Therefore, the Court agrees with Judge Fricke that
16 Petitioner has failed to fully exhaust his state judicial remedies and this Court must
17 dismiss his petition without prejudice. *See Coleman v. Thompson*, 501 U.S. 722, 731
18 (1991) (court must dismiss habeas petition if claims are unexhausted).

21 ² 28 U.S.C. § 1343 confers original jurisdiction on the district court to “redress the deprivation,
22 under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or
immunity secured by the Constitution of the United States . . .” 28 U.S.C. § 1343.

1 Second, Petitioner argues that his procedural default in the state courts is excused
2 by cause and prejudice sufficient to overcome the bar on federal court review of his
3 claims. *Id.* at 3–16. “Where a defendant has procedurally defaulted a claim by failing to
4 raise it on direct review, the claim may be raised in habeas only if the defendant can first
5 demonstrate either ‘cause’ and actual ‘prejudice’” *United States v. Braswell*, 501
6 F.3d 1147, 1149 (9th Cir. 2007) (quoting *Bousley v. United States*, 523 U.S. 614, 622
7 (1998)). The Court concludes that Petitioner has not shown cause and prejudice excusing
8 his failure to present his claims to the state court such that federal review is proper.
9 Therefore, his objection to the R&R on this basis is denied.

10 Third, Petitioner continues to argue that state courts lack jurisdiction to adjudicate
11 his claim that the manner in which he was charged violates his constitutional right to
12 indictment by a grand jury. Dkt. 16 at 8–34. Section 2254, however, recognizes the
13 jurisdiction of state courts to adjudicate federal constitutional matters. 28 U.S.C.
14 § 2254(d)(1). Regardless, Petitioner’s claim fails on the merits because the Supreme
15 Court has affirmed since 1886 that a state prosecutor does not violate the Due Process
16 Clause of the Fourteenth Amendment by bringing charges based on a criminal
17 information as opposed to an indictment issued by a grand jury. *Hurtado v. People of*
18 *State of California*, 110 U.S. 516 (1886).

19 Finally, Petitioner’s assertion that he has a right to indictment by grand jury as a
20 state prisoner that stems from the Privileges and Immunities Clause of the Fourteenth
21 Amendment rather than the Due Process Clause of the Fourteenth Amendment, *see* Dkt.
22 16 at 6, does nothing to alter the Court’s conclusion that he has failed to exhaust the

1 claims raised in his federal habeas petition. Said another way, whether Petitioner brings
2 his claim of a constitutional violation under the Due Process Clause or the Privileges and
3 Immunities Clause is irrelevant to whether the claim has been exhausted. Consequently,
4 Petitioner's objection on this basis is also denied.

5 Petitioner lodges numerous other objections that are meritless.

6 Therefore, the Court having considered the R&R, Petitioner's objections, and the
7 remaining record, does hereby find and order as follows:

- 8 (1) The R&R is **ADOPTED**;
- 9 (2) Petitioner's federal habeas petition, Dkt. 7, is **DISMISSED without**
10 **prejudice**;
- 11 (3) Petitioner's other motions, Dkts. 12, 13, 14, are **DENIED as moot**;
- 12 (4) A Certificate of Appealability is **DENIED**; and
- 13 (5) The Clerk shall enter **JUDGMENT** and close the case.

14 Dated this 3rd day of March, 2020.

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17 BENJAMIN H. SETTLE
18 United States District Judge
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